

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CALVIN BOLDING,

Defendant and Appellant.

D048391

(Super. Ct. No. SCD195413)

APPEAL from a judgment of the Superior Court of San Diego County, George W. Clarke, Judge. Affirmed.

After the court denied a motion to substitute appointed counsel (*People v. Marsden* (1970) 2 Cal.3d 118), Calvin Bolding entered a negotiated guilty plea to possessing a controlled substance (Health & Saf. Code, § 11350 subd. (a)).¹ The court denied credit for time served and sentenced him to a stipulated 16-month lower term in

prison. The court denied a certificate of probable cause. (Cal. Rules of Court, rule 30(b).)

DISCUSSION

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible but not arguable issues: (1) whether the trial court abused its discretion in denying the *Marsden* motion; (2) whether the trial court erred in denying presentence credit for time served; (3) whether the trial court erred in failing to hold a hearing on Bolding's entitlement to credit for time served; (4) whether Bolding's guilty plea was voluntary and intelligent; and (5) whether the trial court erred in failing to place Bolding on probation pursuant to Proposition 36.

We granted Bolding permission to file a brief on his own behalf. He has filed two supplemental briefs. Bolding contends: (1) he has not received the reporter's transcript; (2) he was previously sentenced for the crime on which the sentence was imposed here; (3) he was denied effective assistance of counsel; (4) the plea was not constitutionally valid because he was confused when he entered it, he entered it under coercion, and the entry was unintelligent, involuntary and without adequate advice of the consequences; (5)

¹ Because Bolding entered a guilty plea, he cannot challenge the facts underlying the conviction. (Pen. Code, § 1237.5; *People v. Martin* (1973) 9 Cal.3d 687, 693.) We need not recite the facts.

he was not informed of parole and of the restitution fine; and (6) he was erroneously denied the benefits of Proposition 36.

The Reporter's Transcript

In the declaration attached to the *Wende* brief filed by Bolding's counsel on appeal, counsel states that he provided Bolding with the appellate record to assist him in filing a supplemental brief. Because the record before this court includes the reporter's transcripts and reflects that Bolding has been provided with the record, we see no merit in a claim to the contrary. If this record is incorrect, Bolding should seek relief by way of a petition for habeas corpus.

Double Jeopardy

A defendant cannot twice be placed in jeopardy (i.e., sentenced) for same crime. (Pen. Code, § 1023.) On March 22, 2006, the present sentence was imposed. It is based on a conviction of possessing cocaine base on December 1, 2005. The record does not reflect any other sentence was imposed for this crime.

Effective Assistance of Counsel

Defendants have a constitutional right to effective counsel in criminal cases. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) The burden is on the defendant to prove he received ineffective assistance of counsel. To do so, the defendant must show counsel failed to act in a manner to be expected of a reasonably competent attorney and that counsel's acts or omissions prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Pope* (1979) 23 Cal.3d 412, 425.) Bolding argues he was denied effective assistance of counsel through counsel's failure to object to

presentence credit and to the restitution fine, not knowing the outcome of the plea agreement in full, not challenging the validity of Bolding's prior conviction, deficient performance on the motion to suppress evidence, not discussing the case with Bolding in detail, not telling Bolding the truth, concern only with the plea agreement, forging Bolding's initials on the plea agreement form, and cajoling Bolding to waive his right to appeal. We cannot tell from the record whether counsel engaged in any of the conduct of which Bolding complains, or if he did, why. "Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance [of counsel] is more appropriately made in a petition for habeas corpus" filed in the trial court. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.)

Validity of the Plea Agreement

Absent a certificate of probable cause, a defendant cannot challenge the validity of a guilty plea on appeal. (Pen. Code, § 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) Whether the court properly advised Bolding of the consequences of the plea of guilty is relevant only to the validity of the plea. (See *People v. Pinon* (1979) 96 Cal.App.3d 904, 910.)

Advice of Parole

When Bolding entered the guilty plea, the court advised him he would be subject to four years parole after the prison term.

Restitution Fine

Bolding did not object to the restitution fine when imposed. He cannot do so for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 356.)

Proposition 36

Bolding was in prison on the parole revocation at the time of sentencing in the current conviction. When a defendant is in prison on an unrelated conviction, the duty under Proposition 36 to place a defendant on probation for a nonviolent drug offense does not apply. (*People v. Wandick* (2004) 115 Cal.App.4th 131, 135; *People v. Esparza* (2003) 107 Cal.App.4th 691, 697-699.)

A review of the entire record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issues referred to pursuant to *Anders v. California, supra*, 386 U.S. 738, and the issues raised by Bolding has disclosed no reasonably arguable appellate issue. Competent counsel has represented Bolding on this appeal.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.